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In the Supreme Court of the United States

OCTOBER TERM, 1994

DONALD G. SPENCER, PETITIONER

v.

JESSE BROWN, SECRETARY OF VETERANS AFFAIRS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Veterans' Judicial Review Act, Pub. L. No. 100-687, 102 Stat. 4105 (1988), applies retroactively to petitioner's claim for service-connected disability compensation.

2. Whether petitioner has submitted "new and material evidence" that would permit the reopening of his claim for service-connected disability compensation.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A2-A23) is reported at 17 F.3d 368. The opinion of the Court of Veterans Appeals (Pet. App. A25-A92) is reported at 4 Vet. App. 283. The opinion of the Board of Veterans' Appeals (Pet. App. A93-A111) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 15, 1994. The petition for a writ of certiorari was filed on May 16, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner served on active duty with the United States armed forces from March 1944, to February 1946. Pet. App. A3. In 1975, petitioner was diagnosed with multiple sclerosis (MS). *Ibid.* In November 1976, petitioner filed a claim for service-connected disability compensation, based on his MS, with a regional office of the Veterans Administration (now the Department of Veterans Affairs (VA)). *Ibid.* The claim was supported by a statement from a private physician suggesting the possibility that petitioner suffered his "first attack" of MS while on active duty in the spring of 1945. *Id.* at A3-A4, A28. The VA denied his claim based on the absence of evidence demonstrating that petitioner's disability was connected to his service in the military. *Id.* at A4, A28.

In 1977, petitioner submitted additional statements, from private physicians and from lay persons, in support of his contention that his disability was service-connected. Pet. App. A4, A29. Petitioner also testified under oath at a hearing before the VA regional office that he suffered from fatigue and numbness in his legs during and after his military service; that he began to suffer severe back pain and had "trouble ambulating" following an airplane crash in which he had been involved in the spring of 1945; and that he was found to have "a high level of albumin in his urine" during his military service, a condition that petitioner contends is indicative of MS. *Id.* at A29-A30. Petitioner argued that this evidence demonstrated that he suffered from MS during his military service or during the seven-year period immediately following service, which would presumptive-

ly establish that the MS is service-connected.[1] The VA, however, reaffirmed its earlier decision denying petitioner's claim, concluding that the record remained inadequate to demonstrate an entitlement to compensation. *Id.* at A5.

In May 1978, the Board of Veterans' Appeals (Board) affirmed the VA's decision, holding that insufficient evidence had been presented to support a finding that petitioner's MS was service-connected. Pet. App. A5-A6; C.A. App. 117-118. On January 10, 1980, the Board reconsidered and reaffirmed its 1978 decision. Pet. App. A31. The Board held that its May 1978, decision constituted a final determination of petitioner's claim. C.A. App. 128.

In 1983, petitioner submitted additional medical and lay evidence in support of his contention that his MS is service-connected. Pet. App. A31-A33. On October 4, 1984, the Board of Veterans Appeals, after evaluating the additional evidence, concluded that petitioner had failed to present a new factual basis for his claim. *Id.* at A33.

Petitioner again sought to have his claim reopened in 1986. Pet. App. A34. On March 30, 1987, the Board denied that request, concluding that petitioner had failed to establish new factual grounds for his claim. *Ibid.*

In May, 1989, petitioner and his wife testified under oath concerning petitioner's medical condition at a hearing before the VA regional office. Pet. App. A34. On July 23, 1990, the Board again determined that petitioner

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[1] The veterans' benefits statute provides that, for individuals such as petitioner who served in the military "for ninety days or more during a period of war," MS is presumed to be service-connected if it results in "a 10 percent degree of disability or more within seven years from the date of separation from such [military] service." 38 U.S.C. 1112(a)(4) (Supp. IV 1992).

had not demonstrated a new factual basis and therefore declined to reopen his claim. *Id.* at A34-A35.

2. On March 1, 1993, the United States Court of Veterans Appeals (CVA) affirmed the Board's July 23, 1990, decision. The CVA rejected petitioner's argument that the Veterans' Judicial Review Act (VJRA), Pub. L. No. 100-687, 102 Stat. 4105 (1988), required the VA and the Board to conduct de novo review of petitioner's previously disallowed claim. The CVA noted (Pet. App. A43) that Congress has prohibited such claims from being reopened in the absence of "new and material evidence." 38 U.S.C. 5108, 7104(b) (Supp. IV 1992). When the Board has rendered a final decision disallowing an individual's claim, the CVA held that benefits nevertheless can be awarded in response to a subsequently enacted statute, but only where the statute alters the substantive elements of a claim for veterans' benefits. Pet. App. A46 (discussing 38 U.S.C. 5110(g) (Supp. IV 1992)). The CVA noted that the VJRA made important procedural changes governing the adjudication of claims,[2] but did not alter any substantive requirement pertinent to petitioner's claim, and therefore could not be applied to petitioner's claim. Pet. App. A53-A55.

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[2] Among other things, the VJRA established the United States Court of Veterans Appeals, 38 U.S.C. 7251 (Supp. IV 1992), and provided claimants with a right to judicial review of decisions rendered by that court, 38 U.S.C. 7292 (Supp. IV 1992); required the Board to provide a written statement of findings and conclusions that explain and evaluate the evidence presented, 38 U.S.C. 7104(d)(1) (Supp. IV 1992); codified the burden of proof applicable in benefits proceedings in a manner consistent with a pre-existing VA regulation, 38 C.F.R. 3.102 (38 U.S.C. 5107 (Supp. IV 1992)); and codified the right of claimants to a decision of the Board based on consideration of all evidence in the record (38 U.S.C. 7104(a) (Supp. IV 1992)).

Finally, the CVA concluded that petitioner had not presented any "new and material evidence" that would permit the reopening of petitioner's previously disallowed claim. Pet. App. A91. The CVA rejected petitioner's argument that pre-VJRA law prohibited consideration of evidence other than official service department reports and that the Board therefore had ignored the evidence submitted by petitioner. The CVA concluded that the record did not reveal that the VA and the Board departed from their permissible practice of considering all submissions by a claimant before determining whether the information constituted "new and material evidence." *Id.* at A61-A64, A89-A90.

3. The court of appeals affirmed. Pet. App. A2-A23. The court concluded that the VJRA did not alter the nature of petitioner's claim for compensation "such that it became different and distinct from the one previously denied by the Board," and therefore held that de novo review of petitioner's claim was not available. *Id.* at A16-A17. The court of appeals also affirmed the CVA's determination that the evidence presented by petitioner in the 1990 proceeding was not "new and material." *Id.* at A21-A23.[3]

ARGUMENT

1. a. The administrative system governing the award of service-connected disability benefits operates "with a high degree of informality and solicitude for the claimant." *Walters* v. *National Ass'n of Radiation Survivors*, 473 U.S. 305, 311 (1985); see also 38 C.F.R.

[3] The court of appeals concluded that the CVA did not commit any legal error with respect to that determination, and that it lacked jurisdiction to review the CVA's application of law to the facts of this case. Pet. App. A22-A23; see 38 U.S.C. 7292(d)(2) (Supp. IV 1992).

3.103(a), 3.159. Nevertheless, once a final decision has been rendered denying a veteran's claim, the claim "may not thereafter be reopened and allowed and a claim based upon the same factual basis may not be considered." 38 U.S.C. 7104(b) (Supp. IV 1992). There is an exception to this general rule of finality. That exception permits a claim to be reopened when "new and material evidence is presented or secured" establishing a new factual basis for an award of compensation. 38 U.S.C. 5108 (Supp. IV 1992). The essence of petitioner's submission (Pet. 34-35) is that the enactment of the VJRA requires the reopening of his claim even in the absence of "new and material evidence." The courts below correctly rejected this contention.

Petitioner relies on 38 U.S.C. 5110(g) (Supp. IV 1992), which provides that if compensation "is awarded or increased pursuant to any Act or administrative issue," the award or increase shall take effect no earlier than the effective date of the new enactment. 38 U.S.C. 5110(g) (Supp. IV 1992); see also 38 C.F.R. 3.114(a) (implementing Section 5110(g)). That language of course "presupposes" (Pet. App. A50) that a claim may be reopened in response to certain changes in law. But the VJRA had no impact on *the type* of changes encompassed by Section 5110(g). The courts below properly concluded that that provision applies only to changes in the "requirements for establishing entitlement" to veterans' benefits, because Section 5110(g) applies to awards or increases made "pursuant to" a new statute or administrative issue. The phrase "pursuant to" suggests that Section 5110(g) is limited to statutes and regulations that "provide[] a substantive basis for establishing entitlement to benefits." Pet. App. A51, A54. It makes little sense to state that benefits are awarded

"pursuant to" statutes, like the VJRA, that effect only procedural changes.

Moreover, the interpretation adopted by the courts below properly harmonizes Section 5110(g) and Section 7104(b), which prohibits the "reopen[ing]" of prior claims (in the absence of "new and material evidence," 38 U.S.C. 5108 (Supp. IV 1992)). A claim for compensation filed pursuant to a statute that creates a new substantive basis for entitlement to benefits is "separate and distinct" from a claim that was filed and disallowed prior to the enactment of the statute. Pet. App. A12 (quoting *id.* at A46). In such circumstances, a new claim is being pursued, and the general prohibition against "reopen[ing]" prior disallowed claims does not apply. Here, however, there is no claim different from that which the Board disallowed in May 1978; petitioner has invoked the VJRA not to file a new claim, but to obtain additional review of his prior disallowed claim. That amounts to an attempt to "reopen" the prior claim, in violation of the general rule of finality set forth in Section 7104(b).

Finally, the VJRA is a waiver of sovereign immunity and therefore must be strictly construed in favor of the government. See, *e.g.*, *United States Dep't of Energy* v. *Ohio*, 112 S. Ct. 1627, 1633 (1992); *United States* v. *Nordic Village, Inc.*, 112 S. Ct. 1011, 1014-1015 (1992).[4] This principle counsels against petitioner's broader reading of Section 5110(g), which would encompass procedural, as well as substantive, changes in law.

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[4] Petitioner's attempt (Pet. 40) to distinguish *Nordic Village* is unavailing. Although that case involved a different statutory provision, we rely on *Nordic Village* (as did the court of appeals, Pet. App. A17) only for the well-settled rule that waivers of sovereign immunity are to be construed narrowly.

A. Petitioner's challenge to the decisions below rests primarily on this Court's recent decision in *Landgraf* v. *USI Film Products*, 114 S. Ct. 1483 (1994). The holding of *Landgraf*, however, is that a statute should *not* be given retroactive effect absent evidence of clear congressional intent in favor of retroactivity. *Landgraf*, 114 S. Ct. at 1505.[5] Petitioner cites no persuasive evidence demonstrating that Congress intended to permit the reopening of claims that had already been disallowed and for which "new and material evidence" had not been submitted.

Petitioner attempts to carry his burden under *Landgraf* by suggesting (Pet. 27, 36) that Congress enacted the VJRA because it was concerned about the unfairness of the VA's existing decisionmaking processes. Petitioner's claim is too broad to be meaningful. All legislation implies some level of dissatisfaction with the existing state of affairs.[6] As this Court noted in a case

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[5] There can be no doubt, and petitioner effectively concedes (Pet. 32-37), that he seeks retroactive application of the VJRA. Application of the VJRA to this case would "increase a party's liability for past conduct," *Landgraf*, 114 S. Ct. at 1505, because when the VJRA was signed into law, *no* liability could be imposed on the government with respect to petitioner's claim for compensation in the absence of "new and material evidence"—the Board of Veterans Appeals had issued its final determination more than ten years earlier. Indeed, *Landgraf* presented a stronger case for retroactivity than the present case. *Landgraf* was pending on appeal on the date that a new statute, the Civil Rights Act of 1991, was signed into law, and thus the question was whether the new statute would apply to *pending* cases. Here, in contrast, there was no reviewable claim pending on the date that the VJRA took effect.

[6] We note, however, that petitioner overstates the relevance of any purported flaws of the pre-VJRA administrative system. The legislative history of the VJRA indicates that Congress had

decided with *Landgraf*, the fact that Congress intended to effect changes does not relieve the party arguing for retroactivity from the burden of demonstrating a "clear expression of congressional intent to reach cases that arose before * * * enactment" of the legislation. *Rivers* v. *Roadway Express, Inc.*, 114 S. Ct. 1510, 1516 (1994). Petitioner cannot make that showing simply by averring (Pet. 36, 37) that the result he seeks is "more just" and "benign," cf. *Rivers*, 114 S. Ct. at 1517-1518 (rejecting reliance on "restorative" intent), that no "private rights" would be affected (Pet. 35), or that no "particular private person" (Pet. 36) would be required to pay under his interpretation. Petitioner's various contentions amount to nothing more than a plea for application of different rules of retroactivity against the government "where fairness requires it." Pet. 37. Nothing in *Landgraf* or *Rivers* supports such a rule, and well-settled principles of sovereign immunity strongly counsel against it.[7]

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considerable confidence in the outcomes reached by that system. See H.R. Rep. No. 963, 100th Cong., 2d Sess. Pt. 1, at 15 (1988) ("The [House Committee on Veterans' Affairs] believes that the existing system achieves a high degree of accuracy and fairness."); H.R. Rep. No. 963, *supra*, at 25 ("[I]t is relatively clear that the Committee views with approval most of the procedures adopted by the VA to adjudicate claims."); H.R. Rep. No. 963, *supra*, at 26 ("[T]he substitution of a court to perform the functions presently performed by the BVA is not intended to express displeasure with the existing BVA method of reviewing claims or to imply that the existing review process is unfair. To the contrary, the Committee believes that veterans presently receive every possible consideration when the BVA reviews a case.").

[7] Petitioner also claims (Pet. 37) that the procedural nature of the changes effected by the VJRA "militates in favor of having [his] claim considered within a domain of procedural fairness." It is unclear whether that is merely intended to reiterate petitioner's

2. Petitioner further contends (Pet. 42) that his claim should be reopened because of his earlier reliance on evidence other than official service department reports. According to petitioner, prior to the enactment of the VJRA, only such "official reports," 38 U.S.C. 4004(b) (1982), could constitute new and material evidence for purposes of reopening an otherwise final claim. Petitioner notes that he did not submit any service department reports to the VA or the Board, and contends that the Board therefore must not have considered any of the evidence that he did submit.

There is no indication that the Board ignored any evidence submitted by petitioner. Pet. App. A90-A91. To the contrary, the practice of the VA and the Board was to consider *all* submissions by a veteran in determining whether "new and material evidence" had been pre-

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repeated claim that the result in this case is unjust. To the extent petitioner intends to suggest that retroactivity concerns have no application to procedural rules, *Landgraf* rejected that view. 114 S. Ct. at 1502 n.29; see also *United States* v. *St. Louis, San Francisco & Texas Ry.*, 270 U.S. 1, 3 (1926); *United States Fidelity & Guar. Co.* v. *United States ex rel. Struthers Wells Co.*, 209 U.S. 306, 316 (1908). To be sure, as *Landgraf* acknowledged, certain procedural rules "may often be applied in suits arising before their enactment without raising concerns about retroactivity." 114 S. Ct. at 1502. A new rule of evidence, for example, could be applied if the case has not yet been tried, but not if the case is already on appeal. Cf. *Landgraf*, 114 S. Ct. at 1505 n.34 (noting that "the promulgation of a new jury trial rule would ordinarily not warrant retrial of cases that had previously been tried to a judge"). Those concerns are not implicated here. At the time the VJRA was enacted, the order denying benefits to petitioner was a decade old. Principles of finality strongly counsel against reopening broad categories of closed claims for application of newly adopted procedural rules, where, as here, Congress has given no indication of an intent to do so.

sented. *Id.* at A61-A64. The courts below correctly concluded that this practice was based on a permissible interpretation of applicable pre-VJRA law. *Id.* at A21, A89-A90. Although petitioner argues (Pet. 44) that the agency's general practice was not followed in this case, the CVA found it "clear" that the Board did not reject petitioner's evidence because it did not take the form of official service department reports. Pet. App. A64. The record supports that conclusion, revealing that the Board evaluated the probative value of petitioner's evidence before denying the requests to reopen his claim. See C.A. App. 124-127, 166-172, 186-188, 240-245. Further review of that fact-bound issue is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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